Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FERNANDO E. MATA,
Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a federal employee successfully sues under Title VII and then proffers overwhelming evidence of retaliation against him for having done so, is a district court deprived of all jurisdiction to remedy that retaliation if the government terminates him and invokes "national security" as its defense?

2. Does Title VII oust the district courts of jurisdiction over *Bivens* actions as to claims that are excluded from the scope of Title VII?

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals were Fernando E. Mata as appellant, and the Federal Bureau of Investigation; Edwin Meese, Attorney General; and William S. Sessions, Director, Federal Bureau of Investigation, as appellees.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in this case on December 13, 1995.

OPINIONS BELOW

The opinion of the District Court is unreported and is reproduced in the Appendix at A. 5a.[1] The opinion of the Court of Appeals is reported at 71 F.3d 513 and appears at A. 1a.

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[1] References to "A." are to the appendix to this petition. References to "R." are to the record in the Court of Appeals.

JURISDICTION

The judgment of the District Court was entered February 8, 1995. A. 5a. The opinion and judgment of the Court of Appeals were entered December 13, 1995. A. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fifth Amendments to the Constitution of the United States, 42 U.S.C. § 2000e-2, 42 U.S.C. § 2000e-3, and 42 U.S.C. § 2000e-16 are reproduced in full or in pertinent part at Appendix C, A. 13a.

STATEMENT

The FBI fired Petitioner eleven months before he could have retired with full benefits as a twenty-year special agent. Petitioner alleged that he was fired because he is an Hispanic agent who successfully participated in a class action lawsuit against the FBI for violations of Title VII. *See Perez* v. *FBI*, 707 F. Supp. 891 (W.D. Tex. 1988).

A. Petitioner's Participation in the Class Action

On January 14, 1987, Bernardo M. Perez filed a class action Complaint against the FBI in the United States District Court for the Western District of Texas. R. 1. The Complaint sought relief under Title VII because of the FBI's "discriminatory employment practices based on race, national origin and religion." *Id.* Perez filed a Second Amended Complaint on June 23, 1987, adding a "cause of action to redress deprivations of civil rights pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)." R. 57. On July 16, 1987, the District Court granted Perez's motion for class certification. R. 65-66. The class con-

sisted of "all hispanic (sic) special agents of the Federal Bureau of Investigation that are currently employed by the Bureau, and any hispanic (sic) special agents that might become employed by the Bureau during the pendency of this lawsuit." *Id.*

Petitioner joined the class, gave a deposition, and testified at trial. R. 67. The District Court found that the FBI had violated Title VII by discriminating against the class members because they were Hispanic. 707 F. Supp. at 929. The District Court then established a Rightful Place Seniority Panel ("Panel") to determine the appropriate remedy for each individual class member. *See Perez* v. *FBI*, 714 F. Supp. 1414, 1417 (W.D. Tex. 1989).

B. The Motion for Relief from Retaliation

Before Petitioner could appear in front of the Panel to obtain his remedy, the FBI filed a motion to stay his appearance pending the resolution of its internal investigation of Petitioner. R. 102; docket sheet, entry no. 522. The District Court granted the FBI's motion. The FBI then resolved its investigation by revoking Petitioner's security clearance and firing him. R. 252-53.

Petitioner filed a motion in the District Court requesting (i) an evidentiary hearing on his allegations of retaliation, (ii) permission to appear before the Panel, and (iii) damages and equitable relief. R. 67. The FBI argued that the District Court lacked jurisdiction to review Petitioner's claims, relying on *Department of Navy* v. *Egan*, 484 U.S. 518 (1988). R. 273. The FBI took the position that *Egan* precludes federal-court jurisdiction to review an Executive Branch decision to revoke a security clearance, even when the revocation is pretextual and done solely in retaliation for bringing a Title VII claim. R. 273.

C. Petitioner's Proffered Evidence of Retaliation [2]

Petitioner proffered overwhelming evidence that the FBI "got even" with him. For fifteen years, he had a spotless record at the FBI. In 1983 he won the Attorney General's Distinguished Service Award for his "extraordinary services . . . in an area vital to the national security, frequently in an atmosphere of substantial personal hazard." R. 91-97. He had never been the subject of a single reprimand, censure or adverse action. R. 76. But things changed after he joined the *Perez* class action.

The first retaliation occurred after Petitioner spoke publicly about the lawsuit at a fundraiser for the class action. The day after Petitioner's comments appeared in the newspaper, Petitioner's supervisor, William E. Wells, berated him in front of approximately 150 agents, stating that Petitioner had done irreparable damage to the image of the Miami Division and been disloyal to the FBI. R. 100-01. Mr. Wells then summoned the Hispanic agents to his Executive Conference Room. He scolded Petitioner in front of the others and singled him out for disloyalty. He then held up his FBI credentials and told the Hispanic agents that when they carried those credentials, they lost their First Amendment rights. R. 100-01.

The next retaliation surrounded Petitioner's testimony. After his deposition was scheduled, Petitioner was told that he would be promoted to Supervisor depending on his cooperation with the Bureau. R. 101. However, several days later, Petitioner was told that he was under investigation for matters relating to national security. R. 101.

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[2] Both parties submitted affidavits and other documents in connection with Petitioner's motion. However, the District Court made no factual findings and treated the FBI's opposition as a motion to dismiss. Accordingly, Petitioner's allegations must be taken as true. *See, e.g., Radovich* v. *National Football League*, 352 U.S. 445, 448 (1957).

In the weeks preceding Petitioner's deposition, two agents confronted him and forced him to sign a written statement. R. 101. Petitioner was also informed that he would have to submit to a polygraph exam. R. 102. And during the deposition, the FBI took from the briefcase of Petitioner's attorney a privileged memorandum that Petitioner had written. R. 78, 106-08. At a hearing requesting sanctions against the FBI regarding this matter, the District Court described the FBI's conduct as "a Fourth Amendment violation," but issued only a warning. R. 108. Petitioner testified at trial on August 15, 1988. R. 102. When he returned to work, his supervisor told him that the FBI wanted to polygraph him immediately. R. 102.

Meanwhile, at the same time Petitioner was giving his deposition and trial testimony, the FBI was interviewing three of his co-workers and two of his supervisors as part of its "national security" investigation. After conducting the interviews and investigating allegations concerning Petitioner, the FBI concluded in an internal memorandum that "all logical investigation has been completed in an attempt to verify these allegations [against Petitioner], *without result.*" R. 273, FBI memo dated 10/18/88, attached to Dixon Declaration, at Tab W (emphasis added).[3]

Declarations from two of the FBI investigators also concluded that Petitioner had done nothing wrong:

- "In this case, there were no facts or allegations to the effect that SA Mata had violated any statute or any internal policies or procedures of the FBI

[3] The FBI filed some of its pleadings in the District Court under seal, including the 1988 declarations referred to in this Petition. The portions of those declarations cited herein are not under seal. Counsel for the FBI has custody of the complete documents and has stated that copies will be made available to the Court upon request.

. . . ." R. 273, Declaration of Charles W. Dixon, November 23, 1988 ("Dixon Decl.") ¶ 10.

- "The agents interviewed could not provide any information to support the issue . . . reporting that FERNANDO MATA may have misused case funds." R. 273, FBI memo dated 6/13/88, attached to Dixon Decl. at Tab K.

- "In the present case, I did not possess facts that gave rise to a belief that SA Mata had violated any Federal law . . . ." R. 273, Declaration of William Q. Doherty, November 23, 1988 ("1988 Doherty Decl.") ¶ 7.

- "I had no facts that would have served as a basis for the belief that SA Mata had violated any internal rules, regulations or policy of the FBI or DOJ which would give rise to an administrative inquiry. The OPR and SPU viewed this matter in the same light, which is apparent from their declination to go further administratively." R. 273. 1988 Doherty Decl. ¶ 8.

For its part, the Department of Justice declined to prosecute Petitioner based on information provided by the FBI, concluding that it could not find "any prosecutable violation of federal criminal law." R. 110.

Rather than dropping its investigation after concluding that Petitioner had done nothing wrong, the FBI increased the pressure. Among other things, the FBI forced Petitioner to take three polygraph exams, interrogated him more than ten times, and confiscated personal items from his desk and locked cabinet, including attorney-client communications. R. 101-03, 901-02.

Petitioner received formal notification on January 24, 1990 that his access to National Security Information was suspended "due to information provided . . . indicating you have disclosed classified information to unauthorized individuals." R. 151. On April 9, 1991, the FBI revoked Petitioner's security clearance. R. 188-97. And on Sep-

tember 6, 1991, the FBI fired him. R. 252-53. On that date, Petitioner was less than one year away from retirement with full benefits as a twenty-year agent. His premature termination deprived him of a substantial portion of those benefits.

The FBI informed Petitioner that its decision was based on Petitioner's "admitted" unauthorized disclosure of classified information to individuals representing the Cuban Government and his fabrication and embellishment of official reports. R. 167. Petitioner denied these charges. R. 174-77, 203. Despite Petitioner's requests, the FBI refused to provide him any of the materials that formed the basis of its action.

Petitioner had no opportunity to examine documents, call witnesses, cross-examine witnesses, or participate in an evidentiary hearing. His fate was left entirely in the hands of those whom the District Court found had discriminated against him, and who the court had found abused the grand jury process to retaliate against Bernardo Perez, the class representative. *Perez*, 707 F. Supp. at 930-35.

D. The District Court Proceedings

Petitioner sought discovery from the FBI but the District Court stayed discovery pending a ruling on the FBI's request to dismiss Petitioner's claims for lack of subject matter jurisdiction. The District Court heard oral argument by counsel on Petitioner's motion, and issued its opinion on February 8, 1995. *See* A. 5a. The District Court made no findings regarding the proffered evidence of retaliation, but adopted the FBI's legal position and dismissed Petitioner's claims for lack of subject matter jurisdiction. A. 12a.

Relying on *Egan* and the "legislative history" of Title VII, the District Court held that Congress had not intended to provide "judicial review of Executive security clearance decisions" when it extended Title VII protection

to federal employees. A. 11a. Petitioner also argued that he was entitled to judicial review of his First and Fifth Amendment claims under *Webster* v. *Doe*, 486 U.S. 592 (1988), which permits district courts to review "constitutional claims," even when "national security" is invoked as the reason for the Executive decision to revoke a security clearance. *Id.* at 603. The District Court held that Petitioner could not raise any "constitutional claims" because Title VII provided his exclusive judicial remedy. A. 9a (citing *Brown* v. *GSA*, 425 U.S. 820 (1976)).

E. The Court of Appeals Decision

On appeal Petitioner challenged the District Court's interpretation of Title VII and its conclusion that the enactment of Title VII barred judicial review even of constitutional claims that cannot be remedied by Title VII. The Fifth Circuit disposed of Petitioner's appeal in a *per curiam* opinion. The Court of Appeals held that although in "the ordinary Title VII situation" Petitioner would be entitled to show that the FBI's reasons for its actions were a "pretext," A. 2a, the court had no jurisdiction in this case because it would require "some judicial scrutiny of the merits of the revocation decision." A. 3a. The Court of Appeals also held that there was no jurisdiction over Petitioner's *Bivens* claims because "Title VII provides both the exclusive cause of action and the exclusive remedy for federal employees who wish to assert claims of employment discrimination." A. 4a (citing *Brown*, 425 U.S. 820).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision permits a federal agency to fire an employee for successfully bringing a Title VII claim. As long as the agency revokes the employee's security clearance and cites "national security" as its reason, the courts have no jurisdiction to review the matter. However, in *Webster*, this Court held that a homosexual employee of the CIA was entitled to judicial review of

his "constitutional claim" that the CIA fired him in violation of his right to equal protection of the laws. 486 U.S. at 602-03. In light of *Webster*, the Fifth Circuit's decision creates the anomaly that if a person loses his security clearance and is fired because he is homosexual, he is entitled to judicial review of that decision. But if the same thing happens to him because he successfully sues his employer for race discrimination, he is out of luck.

The FBI's position is that it can fire anyone based on race, religion, national origin, gender, or participation in a civil rights lawsuit, and there is nothing that this Court —or any other federal court—can do about it. Federal jurisdiction is completely ousted, according to the FBI, whenever the FBI revokes an employee's security clearance and utters the magic words—"national security."

The Court of Appeals adopted that position, and effectively immunized the FBI and other federal agencies from liability for conduct that violates the core of Title VII and the Constitution. In any case where the plaintiff alleges retaliation or discrimination based on race, religion, national origin, or gender, the FBI can simply revoke his security clearance and obtain a dismissal on the grounds that the court has no jurisdiction. The FBI and other agencies now have in their arsenal a bulletproof defense to these claims.

The decision below cannot be reconciled with the commands of Title VII or the decisions of this Court. In Title VII cases, if the defendant articulates a legitimate, non-discriminatory reason for its adverse action, the plaintiff "must . . . be afforded a fair opportunity to show that [the] stated reason for [the action] was in fact pretext." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804 (1973); *see also Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1980). The Fifth Circuit's decision eliminates this indispensable element of Title VII protection. The decision also disregards the EEOC's posi-

tion that "[e]mployers cannot, merely by invoking national security, exempt themselves from coverage of the nondiscrimination provisions of [Title VII]." *EEOC: Policy Statement on National Security Defense to Bias Charges*, ("EEOC Policy Statement") 8 Lab. Rel. Rep. (BNA) 405:6625 (Approved by Chairman Thomas, May 1, 1989).

In addition, the decision cannot be squared with this Court's decisions regarding the ouster of jurisdiction over constitutional claims. Since at least 1803, the Judiciary has been charged with ultimate responsibility for determining what the Constitution requires. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). More recently, in *Webster*, this Court "emphasized . . . that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." 486 U.S. at 603 (citing *Johnson* v. *Robison*, 415 U.S. 361, 373-74 (1974) and *Weinberger* v. *Salfi*, 422 U.S. 749 (1975)). Thus, Title VII does not pre-empt the assertion of constitutional claims when the plaintiff is "unprotected by the statute." *Davis* v. *Passman*, 442 U.S. 228, 247 (1979). Here, the Court of Appeals relied on Title VII to oust jurisdiction over Petitioner's constitutional claims, even though it held that Petitioner's claims are excluded from the scope of Title VII.

The Court of Appeals' holding—that there is no jurisdiction even to consider whether the FBI retaliated—is the legal equivalent of "heads I win, tails you lose." The government cannot have it both ways. Either Petitioner is entitled to judicial review under Title VII—as this Court, the statute, and the EEOC say—or he is entitled to judicial review of his constitutional claims on the grounds that Title VII does not cover those claims.

I. THE FIFTH CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S DECISIONS REGARDING TITLE VII.

In a unanimous opinion, this Court in *McDonnell Douglas* established the basic requirements for proving a Title VII case. First, the plaintiff must establish a prima facie case of discrimination. 411 U.S. at 802. Second, if the plaintiff makes a prima facie case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse action. *Id.* Third, if the defendant carries this burden, the plaintiff must then have an opportunity to prove that the legitimate reasons offered by the defendant were not its true reasons, but rather a pretext for discrimination. *Id.* at 804. This Court unanimously reaffirmed these requirements in *Burdine*, 450 U.S. at 252-53.

The third stage of *McDonnell Douglas* is crucial because if the plaintiff fails to show "pretext," the challenged employment action "must stand." 411 U.S. at 807. Eliminating the third stage effectively eliminates Title VII cases because the defendant's burden in the second stage—to articulate a legitimate, non-discriminatory reason—is not heavy. "The defendant need not persuade the court that it was actually motivated by the proffered reasons." *Burdine*, 450 U.S. at 254. Rather, the defendant need only satisfy a "burden of production," *id.* at 255 n.8, which "is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.* at 254-55. For that reason, this Court has repeatedly held that the "plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 578 (1978); *see also United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 n.5 (1983).

The Court of Appeals' decision eliminates the third stage of *McDonnell Douglas* in a Title VII retaliation

action. The defendant not only wins, but ousts all jurisdiction, merely by raising "a genuine issue of fact." *Burdine*, 450 U.S. at 254. The decision unravels *McDonnell Douglas* and defeats the basic purpose of Title VII's retaliation provision, which is to "protect the employee who utilizes the tools provided by Congress to protect his rights." *Sias* v. *City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978). The decision also disregards both the plain, unambiguous language of Title VII and the EEOC's interpretation of it.

Title VII applies to "[a]ll personnel actions." 42 U.S.C. § 2000e-16(a). Title VII also makes it "unlawful . . . for an employer . . . to discriminate against any individual . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). When "national security" is at stake, however, section 703(g) of Title VII allows an employer to discharge an individual if his position

> is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and . . . such individual . . . has ceased to fulfill that requirement.

42 U.S.C. § 2000e-2(g).

The question is whether section 703(g) precludes *judicial review* of Title VII claims whenever the government cites "national security" as its reason for discharging an employee. The Court of Appeals answered "yes." The answer, according to the EEOC, is "no."

After *Egan*, the EEOC published a Policy Statement "concerning the use of the national security exception in section 703(g) of Title VII as a defense against a charge of employment discrimination." EEOC Policy Statement, 8 Lab. Rel. Rep. at 405:6625. The EEOC concluded that section 703(g) is merely "an affirmative defense to

a charge of discrimination," not a bar to jurisdiction. *Id.* at 405:6625. Thus, "[e]mployers cannot, *merely by invoking national security*, exempt themselves from coverage of the nondiscrimination provisions of the act." *Id.* at 405:6626. Since announcing this policy statement, the EEOC has routinely adhered to it in cases litigated before the agency. *See, e.g., Schroeder* v. *Perry*, 1994 WL 735565 at *3 (E.E.O.C. April 14, 1994); *Phillips* v. *Dalton*, 1995 WL 95860 at *3 (E.E.O.C. March 3, 1995); *Fields* v. *Aspin*, 1993 WL 763357 at *3 (E.E.O.C. December 23, 1993).

In accordance with the *Chevron*[4] doctrine, this Court holds that "the EEOC's interpretation of Title VII . . . need only be reasonable to be entitled to deference." *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988). The EEOC's construction of the scope of the "national security" defense is "reasonable" given Congress' intent in Title VII to "eradicat[e] completely" from federal employment "discrimination of *any* kind based on factors not relevant to job performance." *See* H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 2137, 2158 (emphasis added) (quoting Memorandum of President Nixon accompanying Exec. Order No. 11,478).

Title VII states in unmistakable language: "*All personnel actions* affecting employees . . . in executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a) (emphasis added). Congress' explicit command that Title VII covers *all* personnel actions should be interpreted to mean just that. *See South Dakota* v. *Bourland*, 113 S. Ct. 2309, 2315-16 (1993) ("when Congress used the term 'all claims, rights, and demands' of the Tribe . . . it meant *all* claims, rights, and demands") (emphasis in original) (citation omitted). Al-

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[4] *Chevron, U.S.A.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

though section 703(g) may provide a "national security" *defense* to a Title VII claim, it does not deprive the courts of *jurisdiction*. The word "jurisdiction" does not even appear in section 703(g). Nothing in Title VII states that the courts are ousted of jurisdiction to determine whether "national security" is a pretext for retaliation.

As the EEOC concluded, this Court's decision in *Egan* does not deprive a district court of that jurisdiction. EEOC Policy Statement, 8 Lab. Rel. Rep. at 405:6626. In *Egan*, this Court addressed the "narrow question . . . whether the Merit Systems Protection Board (Board) has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." 484 U.S. at 520. The Court held that the Board could not review the security clearance decision because the statute at issue—the Civil Service Reform Act of 1978—gave the Board jurisdiction only over "adverse actions," which by definition did not include the denial of a security clearance. *Id.* at 530.[5]

Egan "did not speak to the situation in which there is an allegation of the government's *pretextual* revocation of a security clearance." *Buttino* v. *FBI*, 801 F. Supp. 298, 301 (N.D. Cal. 1992) (emphasis in original). The *Egan* plaintiff did not allege a Title VII retaliation claim or a

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[5] The statute defined "adverse actions" specifically to include only "a removal, a suspension for more than 14 days, a reduction in grade or pay, and a furlough of 30 days or less." *Id.* (citing 5 U.S.C. §§ 7513(d), 7512). The denial of a security clearance was not included on the specific list of actions over which the Board was given authority. By contrast, in Title VII Congress did not enact a laundry list of actions to which Title VII applies. Congress chose instead to use the broadest grant of authority possible. Thus, Title VII applies to "[a]ll personnel actions," 42 U.S.C. § 2000e-16(a), which by definition must include the revocation of a security clearance. *Cf. Hubbard* v. *United States*, 115 S. Ct. 1754, 1759 (1995) (courts are bound to apply the plain, unambiguous language of statutes).

Bivens action. He claimed only that the Navy improperly denied him a security clearance based on his failure to disclose prior convictions and admitted alcohol abuse. 484 U.S. at 521. His Title VII and constitutional rights were not even implicated because his status as an alcoholic felon is not a protected class under Title VII or the Constitution.

Although *Egan* does require that deference be given to the Executive Branch on matters of national security, *id.* at 530, "deference to Executive Branch decisions does not require the Judiciary to abdicate its authority under Article III to decide whether or not an individual's right to equal protection under the Federal Constitution has been violated." *Buttino*, 801 F. Supp. at 301 (quoting *Dubbs* v. *CIA*, 769 F. Supp. 1113, 1116 n.3 (N.D. Cal. 1990)). In direct conflict with *McDonnell Douglas*, the language of Title VII, and the EEOC's construction of Title VII's "national security" defense, the Fifth Circuit's decision allows FBI officials to "discriminat[e] *through* their security clearance decision-making authority with the comfort of knowing that the nonreviewability of the 'merits' of security clearance determinations would serve to immunize the *discrimination* from judicial review." *Id.* (emphases in original).[6]

The Fifth Circuit's concern that Petitioner's claim would require "judicial scrutiny of the merits of the revocation decision" rests on a misperception of *McDonnell Douglas*. A. 3a. Petitioner can carry his burden of proving retaliation and pretext with evidence of the FBI's

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[6] The Ninth Circuit recently issued the first reported decision holding that there was no jurisdiction to review the revocation of a security clearance where the plaintiff alleged race discrimination claims based on Title VII and the Fifth Amendment. *Brazil* v. *U.S. Dep't of Navy*, 66 F.3d 193 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3439 (U.S. Dec. 14, 1995) (No. 95-957). Unlike Petitioner, the *Brazil* plaintiff did not allege retaliation. Nevertheless, *Brazil* demonstrates that another court has recently ousted federal-court jurisdiction in conflict with this Court's decisions.

treatment of Petitioner before he joined *Perez*, the FBI's reaction to his participation in *Perez*, the timing of the FBI's actions, the FBI's conduct against other persons who have committed acts of comparable seriousness, and the FBI's general policy and practice with respect to minorities. *McDonnell Douglas*, 411 U.S. at 804-05. None of this evidence would require the district court to review the merits of a security clearance revocation.

II. THE FIFTH CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S DECISIONS CONCERNING FEDERAL COURT JURISDICTION OVER CONSTITUTIONAL CLAIMS.

Petitioner alleged that he was fired because he is Hispanic and because he joined a civil rights lawsuit against his employer. This retaliation and discrimination give rise to claims based directly on the First and Fifth Amendments to the Constitution. *See Perry* v. *Sindermann*, 408 U.S. 593, 598 (1972) (violation of First Amendment right to speak about matters of public interest and importance gives rise to "constitutional claim"); *Passman*, 442 U.S. at 244, 236 (1979) (permitting "a cause of action under the Fifth Amendment" to enforce the "constitutional right to be free from illegal discrimination"). Under this Court's decisions, Title VII does not oust the federal courts of jurisdiction over Petitioner's constitutional claims.

A. *Webster* Permits Judicial Review of Constitutional Claims in Matters Involving "National Security."

This Court held in *Webster* that "a constitutional claim based on an individual discharge may be reviewed by the District Court," 486 U.S. at 603-04, notwithstanding the CIA's argument that judicial review was precluded "no matter what the nature of respondent's constitutional claims." *Id.* at 603. The Court warned that a " 'serious constitutional question' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* (quoting *Bowen* v.

Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986)).

In *Webster*, the CIA terminated an employee after learning that he was a homosexual. The employee challenged his termination by "assert[ing] a variety of statutory and constitutional claims." *Id.* at 596. The CIA moved to dismiss the action, arguing that § 102(c) of the National Security Act [7] precludes judicial review of the CIA Director's termination decisions under the Administrative Procedure Act ("APA").[8]

After reviewing "the language and structure" of § 102 (c), the Court held that the statute precluded judicial review of the employee's *statutory* claim under the APA. 486 U.S. at 601. However, the Court applied a different analysis to the question whether the employee's *constitutional* claims were also precluded, emphasizing "that where Congress intends to preclude judicial review of *constitu-*

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[7] Section 102(c) states, in pertinent part, as follows:

> [T]he Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States . . . .

50 U.S.C. § 403(c).

[8] In its argument in the district court in *Webster*, the government actually took the position that it did *not* have the unbridled authority it now claims in this case:

> THE COURT: [O]ne paramount question . . . is whether or not you claim that the agency has unlimited and unbridled authority.
>
> * * * *
>
> MR. WHITE: The director is not asserting that he has what the Court has characterized as unlimited or unbridled authority. The statutes applicable to the Director's authority certainly do not give him the power to act unconstitutionally and the provisions of Title VII, for example, would apply if there is a fair allegation of improper personnel practices discriminating against employees on the basis of race, for example.

A. 18a-19a.

tional claims its intent to do so must be clear." *Id.* at 603 (emphasis added). Applying that "heightened" standard to § 102(c), the Court concluded:

> Nothing in § 102(c) persuades us that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the Director pursuant to that section; we believe that a constitutional claim based on an individual discharge may be reviewed by the District Court.

Id. at 603-04.

The Court was not persuaded by the CIA's claim that judicial review of such constitutional claims would "entail extensive 'rummaging around' in the Agency's affairs to the detriment of national security." *Id.* at 604. "Title VII claims attacking the hiring and promotion policies of the Agency are routinely entertained in federal court . . . and the inquiry and discovery associated with those proceedings would seem to involve some of the same sort of rummaging." *Id.* Moreover, the Court noted, concerns over national security can be satisfied by the district court, which "has the latitude to control any discovery . . . so as to balance . . . [the] need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Id.*

B. Title VII Does Not Oust Federal Courts of Jurisdiction Over Constitutional Claims in Cases Where Title VII Fails to Provide a Remedy.

Nothing in Title VII satisfies the "heightened showing" required by *Webster* to oust the district court of jurisdiction over Petitioner's constitutional claims. *Id.* at 603. Relying on *Brown*, the Court of Appeals held that the district court "lacked jurisdiction over [Petitioner's] *Bivens* claims under the First and Fifth Amendments . . . [because] Title VII provides both the exclusive cause of

action and the exclusive remedy for federal employees who wish to assert claims of employment discrimination." A. 4a.

This decision conflicts with *Passman*, which holds that Title VII does not pre-empt a *Bivens* action when the plaintiff is "unprotected by the statute." 442 U.S. at 247. When Title VII offers no protection and "no other alternate forms of judicial relief" are available, Title VII "leaves undisturbed whatever remedies petitioner might otherwise possess." *Id.* at 245, 247. Thus, in a case decided the same day as *Brown*, this Court accorded a non-Title VII judicial remedy for a claim of federal employment discrimination to an alien who was not protected by Title VII. *See Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 96 (1976). And more recently, *Webster* permitted a homosexual who was not covered by Title VII to bring a *Bivens* action. 486 U.S. at 592-93.

In *Bush* v. *Lucas*, 462 U.S. 367, 385, 386 (1983), this Court held that a federal employee could not assert a *Bivens* claim based on the First Amendment, but only because he was actually "protected by an elaborate, comprehensive scheme" that provided "the right to examine all disclosable materials that formed the basis of the proposed action," *id.* at 386, "a trial-type hearing at which the employee could present witnesses, cross-examine the agency's witnesses, and secure the attendance of agency officials," *id.* at 387, and judicial review in either federal district court or the Court of Claims of any adverse decision. *Id.* By contrast, Petitioner got nothing that can be described as "meaningful." *Id.* at 386. His sole "remedy" was to correspond with and make a written plea to the very branch of government that was found to have discriminated against him in this case.[9]

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[9]As the concurrence in *Bush* emphasized, if the plaintiff had not actually been protected by the "comprehensive scheme," a differ-

The Court of Appeals disposed of Petitioner's constitutional claims using a mechanical—but flawed—syllogism based on *Brown*. *Brown* held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." 425 U.S. at 835. Therefore, the argument goes, because Title VII is a statutory remedy, Petitioner cannot raise constitutional claims that entitle him to judicial review under *Webster*.[10]

The illogic of this syllogism is that Petitioner's so-called exclusive remedy, as interpreted by the Court of Appeals, is no remedy at all—the court, it holds, does not even have jurisdiction over the matter. Thus, the problem with the court's decision is that "[i]t simply makes no sense to speak of an 'exclusive judicial remedy' when there is no remedy at all." *Davis* v. *Passman*, 544 F.2d 865, 874 (5th Cir. 1977), *aff'd*, 442 U.S. 228 (1979). Nevertheless, the court held that this exclusive remedy—though non-existent—displaces Petitioner's rights under the Constitution. In other words, Petitioner is actually worse off as a result of being "protected" by Title VII.[11]

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ent case would have been presented. 462 U.S. at 390 (Marshall, J., concurring).

On August 2, 1995, the President issued Executive Order No. 12,968 to establish a uniform federal program regarding access to classified information. Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (1995). The Order, which comes too late to benefit Petitioner, does not in any event provide a "meaningful" remedy because it "is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review." *Id.*, § 7.2(e) at 40,254. Accordingly, the Order does not oust the district courts of jurisdiction over Title VII or *Bivens* actions. *See Passman*, 442 U.S. at 243-44 n.21.

[10] Of course, because sexual orientation is not a protected class under Title VII, the plaintiff in *Webster* was unable to bring a Title VII claim. His only recourse was a *Bivens* action based directly on the Constitution.

[11] In *Brazil*, the Ninth Circuit attempted to distinguish *Passman*, stating that Mr. Brazil was "covered by the 'massive and complex

As the decisions of this Court in *Passman*, *Hampton*, and *Webster* establish, the mere enactment of Title VII did not suddenly take away federal court jurisdiction to protect constitutional rights in cases where Title VII provides no protection at all. The Fifth Circuit's decision cannot be reconciled with these cases, or with the words of Judge Goldberg, whose panel opinion was affirmed by this Court in *Passman*:

> Title VII among other things implements constitutional rights . . . . When the statute affords relief from a constitutional invasion, the statutory methodology should be followed, but when the statute does not attempt to implement the constitutional rights sought to be vindicated, we cannot then use the statute as the sword to demean or to eliminate the constitutional right. The constitutional right stands on its own words without the necessity of Title VII's supporting procedures. Title VII's exemptions cannot build a haven for constitutional transgressors.

544 F.2d at 876.

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program' of Title VII in all areas of discrimination except for that relatively narrow area dealing with security clearance decisions." 66 F.3d at 198. However, that distinction is artificial because the "relatively narrow area" referred to by the court is the exception that swallows the rule—in *every* Title VII case, the agency can use this "narrow area" as a pretext to wipe out jurisdiction. More importantly, the attempted distinction violates the most fundamental rules of statutory construction. Congress wrote that Title VII applies to "[a]ll personnel actions." 42 U.S.C. § 2000e-16(a). Congress did not say, "all personnel actions, except for retaliation claims and security clearance decisions." This Court does not permit the judiciary to create exceptions to the plain language of statutes where Congress has not done so. *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 26 (1993).

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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March 12, 1996

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 95-50173

BERNARD M. PEREZ, on behalf of himself and all others similarly situated,
Plaintiff,

and

FERNANDO E. MATA,
Movant-Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION; EDWIN MEESE, Attorney General, WILLIAM S. SESSIONS, Director, Federal Bureau of Investigation,
Defendants-Appellees,

and

WILLIAM H. WEBSTER, Director, Federal Bureau of Investigation,
Defendant.

Appeal from the United States District Court for the Western District of Texas

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Dec. 13, 1995

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

Movant-Appellant Fernando E. Mata, a former employee of the Federal Bureau of Investigation (FBI), appeals the district court's order dismissing, for lack of jurisdiction, Mata's motion seeking relief under Title VII [1] on grounds of retaliation for his participation, on behalf of present and former Hispanic employees, in the instant class action lawsuit against the FBI.[2] In that suit, the district court found no retaliation against any class member other than the named plaintiff, Bernardo Perez.[3]

Mata alleged that, in violation of § 704 of Title VII,[4] the FBI took acts of retaliation against him by revoking his top-secret security clearance and firing him. Employment like Mata's with the FBI requires top-secret security clearance, so the FBI's revocation of Mata's clearance was tantamount to firing him because his eligibilty to serve terminated automatically as a result of the loss of that clearance. In response to Mata's allegations that the revocation of his clearance and resulting firing were retaliatory, the FBI proffered, as non-discriminatory reasons for such adverse employment actions, that Mata (1) fabricated official reports, and (2) disclosed classified information to unauthorized representatives of the Cuban Government. In the ordinary Title VII situation, that would put the ball in Mata's court to show pretext.

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[1] 42 U.S.C. § 2000e, et seq.

[2] *See Perez v. FBI* 707 F.Supp. 891 (W.D.Tex.1988) (liability phase); *see also Perez v. FBI* 714 F.Supp. 1414 (W.D.Tex.1989) (recovery phase).

[3] *Perez*, 707 F.Supp. at 926.

[4] 42 U.S.C. § 2000e-3(a).

Observing that the essence of the retaliation asserted by Mata is the FBI's decision to revoke his security clearance, the district court concluded that it lacked subject matter jurisdiction to review his claim and entered an order of dismissal. It is that order of the district court which is appealed herein by Mata.

Although we understand and sympathize with Mata's frustration at not being able to obtain *judicial* review of his retaliation claims, we come inevitably to the same conclusion reached by the district court: Because the court would have to examine the legitimacy and the possibly pretextual nature of the FBI's proffered reasons for revoking the employee's security clearance,[5] any Title VII challenge to the revocation would of necessity require some judicial scrutiny of the merits of the revocation decision.[6] As the Supreme Court and several circuit

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[5] *See Brazil v. U.S. Dept. of the Navy*, 66 F.3d 193 (9th Cir. 1995) (discussing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)).

[6] We also understand the concern of federal agents, whose employment is conditioned on security clearances, that the lack of judicial review creates the potential for abuse by the agencies and bureaus employing them. This result, however, is required by the fact that security clearance determinations are "sensitive and inherently discretionary" exercises, entrusted by law to the Executive. *Department of Navy v. Egan*, 484 U.S. at 518, 527-29, 108 S.Ct. 818, 823-25, 98 L.Ed.2d 918 "Predictive judgments of this kind" properly are left to "those with the necessary expertise in protecting [the sensitive material,]" rather than in the hands of "an outside nonexpert body" or the equally nonexpert federal courts. *Id.* at 529, 108 S.Ct. at 825; *see also Webster v. Doe*, 486 U.S. 592, 601, 108 S.Ct. 2047, 2052, 100 L.Ed.2d 632 (1988) ("[T]he [Central Intelligence] Agency's efficacy, and therefore the Nation's security, depend in large measure on the reliability and trustworthiness of the Agency's employees . . . . [E]mployment with the Agency entails a high degree of trust that is perhaps unmatched in Government service."). Accordingly, review of these decisions is left to the respective departments of the Executive Branch, which have internal administrative procedures in place for adjudicating employee complaints of discrimination and ap-

courts have held that such scrutiny is an impermissible intrusion by the Judicial Branch into the authority of the Executive Branch over matters of national security, neither we nor the district court have jurisdiction to consider those matters.[7]

In addition to concluding that it lacked subject matter jurisdiction to address Mata's Title VII claim, the district court also determined that it lacked such jurisdiction to address Mata's *Bivens* claims under the First and Fifth Amendments. In so doing, the court correctly relied on Supreme Court and Fifth Circuit precedent to the effect that Title VII provides both the exclusive cause of action and the exclusive remedy for federal employees who wish to assert claims of employment discrimination.[8]

In sum, our review of the evidence and the applicable law convinces us that the determinations of the district court are free of reversible error. We are led, therefore, to the unavoidable conclusion that neither the district court nor this court on appeal has subject matter jurisdiction to consider Mata's Title VII or *Bivens* claims. The rulings of the district court regarding Mata's motion are, therefore,

AFFIRMED.

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peals therefrom. We must stress, therefore, that the Executive Department—in this instance, the Attorney General, the Department of Justice, the Director of the FBI, and the Inspector General—bears a heavy responsibility and special duty of fairness to ensure that its agencies and bureaus do not trample the rights of their employees in employment matters.

[7] *See e.g., Department of the Navy v. Egan*, 484 U.S. 518, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988); *see also Webster v. Doe*, 486 U.S. 592, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988).

[8] *See Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976) (Title VII provides exclusive judicial remedy for claims of discrimination in federal employment); *Porter v. Adams*, 639 F.2d 273 (5th Cir.1981).

APPENDIX B

[Filed Feb. 8, 1995]

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EP-87-CA-10

BERNARDO M. PEREZ

v.

FEDERAL BUREAU OF INVESTIGATION, *et al.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR FERNANDO E. MATA

BEFORE THE COURT, in the above-captioned cause of action, are two motions by Plaintiff and *Perez* class member Fernando E. Mata [hereinafter Mata]: The "Motion of Fernando E. Mata to Appear Before Rightful Place Seniority Panel, and for Relief from Retaliation" filed June 4, 1992, and The "Motion to Prohibit Further Retaliation and the Instigation of Death Threats" filed October 8, 1993. Also before the Court are two replies by the Federal Bureau of Investigation [hereinafter FBI]: "Defendant's Opposition to Motion of Fernando E. Mata to Appear Before Rightful Place Seniority Panel and for Relief from Retaliation" filed August 3, 1992, and "Defendant's Supplemental Pleading in Response to Reply Memorandum of Fernando E. Mata" filed October 22, 1992. On the outset, let it be known that the Court does not usually allow motions such as these to go unanswered

for a period of years; nevertheless, the Court held a hearing on January 17, 1995, in El Paso, Texas. The attorneys for both parties eloquently argued their positions and the Court has rendered a decision.

On August 15, 1988, the *Perez* class members came before the Court alleging the FBI violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. The Court held the FBI violated Title VII when they failed to give Hispanic agents proper credit for their contributions, and consequently excluded the agents from promotions and benefits. *Perez v. Federal Bureau of Investigation*, 707 F.Supp. 891 (W.D. Tex. 1988).

In that decision, the Court set out the standard for § 704 retaliation against employees who have "opposed any practice made an unlawful employment practice by this subchapter" or against employees who have "made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[1] 42 U.S.C. § 2000e-3(a). Mata claims to have been the victim of § 704 retaliation and now asks the Court to make a determination based upon his documented facts. Because Mata's alleged retaliation was in the form of a revocation of his top-secret security clearance and termination of employment,[2] the Court must first address whether federal courts lack judisdiction to review the merits of a security clearance revovation.

Law Applicable

In *Department of the Navy v. Egan*, 484 U.S. 518 (1988), the Supreme Court held that the Merit Systems Protection Board [hereinafter MSPB] had no authority to

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[1] *Perez*, 707 F.Supp. at 922 (therefore, the Court will not re-examine the law applicable under § 704).

[2] All positions with the FBI require a top-secret security clearance. Thus, when the FBI revoked Mata's security clearance, he was no longer eligible to be an employee and was terminated.

review an executive decision to revoke a security clearance. The Navy discharged Egan from his position as an employee when they denied his bid for a security clearance based upon the failure to disclose prior convictions and admitted alcohol abuse. The *Egan* Court made several conclusions throughout the opinion regarding security clearances. First, the Court stated the strong presumption in favor of appellate review of agency decision making found in *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967), is not without limit "and it runs aground when it encounters concerns of national security, as in this case, where the grant of security clearance to a particular employee . . . is committed by law to the appropriate agency of the Executive Branch." *Egan* 484 U.S. at 526-27. Second, the Court stated "no one has a 'right' to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official." *Id.* at 528. Third, the Court concluded that "unless Congress specifically has provided oherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530.

The real problem faced by this Court has been the lack of Fifth Circuit law, after *Egan,* addressing the jurisdictional issue. At lease three Circuit Courts[3] have addressed the issue, and all three have interpreted *Egan* to give Executive decision making the broadest possible power to preclude judicial review.[4] Nevertheless, the Supreme Court in *Webster v. Doe,* 486 U.S. 592 (1988),

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[3] *Hill v. Department of Air Force,* 844 F.2d 1407 (10th Cir. 1988); *Dorfmont v. Brown,* 913 F.2d 1399 (9th Cir. 1990); and *Guillot v. Garrett,* 970 F.2d 1320 (4th Cir. 1992).

[4] Such is the case despite the Supreme Court's statement in *Egan* that "[t]he *narrow question presented* by this case is whether the Merit Systems Protection Board (Board) has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance . . . ." 484 U.S. at 520 (emphasis supplied).

confirmed the lack of jurisdiction in federal courts to review the merits of security clearance determinations. *Webster* dealt with an employee of the Central Intelligence Agency [hereinafter CIA] allegedly terminated from his employment because he informed a CIA security officer that he was a homosexual. After extensive questioning and various internal reports lasting approximately six months, the CIA Director terminated the respondent pursuant to the National Security Act. The Supreme Court held that the Director's decision to terminate the respondent was not subject to judicial review under the Administrative Procedure Act; however, the Court held the respondent's constitutional claims were judicially reviewable. *Id.* at 601 & 603-04. Thus, both the FBI and Mata use *Webster* in their pleadings for its duality—judicial review prohibited under congressional acts dealing with national security; judicial review allowed under constitutional challenges despite national security.

Mata argues the Northern District of California case, *Buttino v. FBI*, 801 F.Supp. 298 (N.D. Cal. 1992), is controlling here. *Buttino* utilized that portion of the *Webster* decision holding a constitutional challenge, such as a violation of equal protection, to be judicially reviewable and not absolutely barred. *Buttino*, 801 F.Supp. at 302 & n.6. Similarly, Mata cites *Dubbs v. CIA*, 769 F. Supp. 1113 (N.D. Cal. 1990), for the same proposition that equal protection challenges to security clearance determination are judicially reviewable. The Court does not challenge the decisions cited by Mata that correctly construe *Webster* in equal protection contexts; nevertheless, there is a fundamental difference between a constitutional challenge (equal protection) and a statutory challenge (Title VII) to security clearance determinations.

In Mata's Reply Memorandum of September 4, 1992 and again at the hearing on January 17, 1995, Counsel alluded to the applicability of constitutional analysis to Mata's case. The Court is aware of the dearth of prece-

dent that pertains to Mata's particular case scenario. Moreover, the Court recognizes the parallels Counsel is attempting to draw out between violations of equal protection found in *Buttino* and in *Dubbs*, and those of alleged racial discrimination found in Mata's case; nevertheless, Mata's alleged § 704 retaliation does fall under Title VII and thus Title VII is the sole vehicle for relief. In *Brown v. General Services Administration*, 425 U.S. 820 (1976), the Supreme Court addressed whether § 717 of the Civil Rights Act of 1964 is the exclusive judicial remedy for claims of discrimination in federal employment. The holding was a resounding "yes." *Id.* at 835. Furthermore, in the Fifth Circuit case, *Porter v. Adams*, 639 F.2d 273 (5th Cir. 1981), the Court stated that appellant could not raise a constitutional claim under the Fifth Amendment and simultaneously raise a Title VII violation:

> Because we conclude that § 717 bars reprisals against federal employees who file charges of discrimination, appellant must bring her action under that section. Even if, as appellant contends, the Fifth Amendment would have afforded her a Bivens claim action for those reprisals prior to the enactment of § 717, such an action is no longer available because § 717 is now the exclusive remedy for charges of discrimination brought against federal employers. Brown v. GSA, 425 U.S. at 835 . . . .

Id. at 278.

The Court concedes there has never been a direct challenge, either successful or not successful, to a security clearance via Title VII. The Fourth Circuit in *Jamil v. Department of Defense*, faced such a challenge by appellant, yet expressly found "Whistleblowing" not to be an actionable claim under Title VII. 910 F.2d 1203, 1207 (4th Cir. 1990). The *Jamil* Court did express what would have been required of the appellant under the *McDonnell Douglas* inquiry to show that an employer's ex-

planation was a mere pretext for discrimination. *Jamil* 910 F.2d at 1208 (referencing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)). Yet, conceded "[w]hether we would be permitted to do so, in light of Egan, is a question which we need not decide since . . . Jamil has not met his burden . . . ." *Id.*

In the later Fourth Circuit case of *Guillot,* the Court faced an argument challenging *Egan*'s apparent narrow holding. *Guillot* dealt with a civilian computer specialist denied a security clearance because he failed to disclose his alcohol and cocaine addition. The appellant claimed the United States Navy violated the Rehabilitation Act of 1973 due to his "disability" of alcohol and drug addiction. The appellant attempted to distinguish *Egan*'s holding that the MSPB had no authority to review an executive decision to revoke a security clearance pursuant to 5 U.S.C. § 7513, by stating " 'the express Congressional intent under the Civil Rights Act of 1964 (the enforcement vehicle for Rehabilitation Act violations)' provides for 'court scrutiny of a security clearance decision where a prima facie case of discrimination has been pled.' " *Id.* at 1325. The *Guillot* Court agreed that *Egan* only addressed the narrow issue of reviewability under § 7513, but continued in its analysis of Executive security clearance decisions by stating:

> We can discern, however, no more an expression of congressional intent in the provisions of the Rehabilitation Act or the Civil Rights Act of 1964 than in section 7513 of title 5 that the Executive's security clearance decisions be reviewable by the MSPB or by federal courts on appeal. . . .
>
> Certainly, Congress has not "specifically provided" in any of these provisions [§ 505 of the Rehabilitation Act & § 717 of the Civil Rights Act of 1964], for either MSPB or judicial review . . . .
>
> Nor do any of these prvisions otherwise evidence the kind of unmistakable expression of purpose that the

> Supreme Court by necessary implication suggested in Egan would be required to support a conclusion that Congress intended to subject the Executive's security clearance determinations to scrutiny for violations of either 501 of the Rehabilitation Act of 1973 or Title VII itself.

Id.

The Court continued its analysis of the Civil Rights Act of 1964 by exploring its legislative history to find any indication of whether Congress intended to provide through the Act an administrative or judicial review of Executive security clearance decisions. In a particularly germane passage, the *Gulliot* Court quoted a portion of the legislative history that stated:

> In providing the statutory basis for such an appeal or court access, it is not the intent of the Committee to subordinate any discretionary authority or final judgment now reposed in agency heads by, or under, statute for national security reasons in the interest of the United States.

Id. (citing H. Rep. No. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 2137, 2185). Therefore, the Court is convinced the delineation by the Supreme Court in *Webster* and furthered by *Guillot* is the correct path in which to proceed. The safeguards remain for both sides—between statutes created by Congress that are *not* judicially reviewable within the national security context; and violations of constitutional guarantees that *are* reviewable and protect the fundamental rights of our citizens. *Cf. Webster v. Doe*, 486 U.S. at 2062-63 (Scalia, J., dissenting) ("Neither the Constitution, nor our laws, nor common sense gives an individual a right to come into court to litigate the reasons for his dismissal as an intelligence agent. . . . The documents needed will make interesting reading for district judges (and perhaps others) throughout the country.").

Accordingly, the Court shall not review the pertient facts of Mata's revocation of security clearance or determine the merits of the decision by the FBI for doing so. The Court lacks subject matter jurisdiction in the matter.

IT IS THEREFORE ORDERED the Motion of Fernando E. Mata to Appear Before Rightful Place Seniority Panel and for Relief from Retaliation is hereby DISMISSED for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED Fernando E. Mata's Motion to Prohibit Further Retaliation and the Instigation of Death Threats is hereby DISMISSED for lack of subject matter jurisdiction.

SIGNED this 6th day of February 1995.

/s/ Lucius D. Bunton
HONORABLE LUCIUS D. BUNTON III
Senior District Judge

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

I

The First Amendment to the Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II

The Fifth Amendment to the Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

III

Title 42 U.S.C. § 2000e-2 provides in pertinent part:

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * *

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, or for an employment agency to fail to refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

* * * *

IV

Title 42 U.S.C. § 2000e-3 provides in pertinent part:

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency,

or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

* * * *

V

Title 42 U.S.C. § 2000e-16 provides in pertinent part:

§ 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

* * * *

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsec-

tion (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or atfer one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

* * * *

APPENDIX D

Excerpts from Transcript of Hearing Before the United States District Court for the District of Columbia, in *Doe v. Casey*, Civil Action No. 82-2016 (Feb. 25, 1983)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2016

JOHN DOE,

Plaintiff

v.

WILLIAM CASEY,

Defendant

Washington, D.C. Friday, February 25, 1983

The above-entitled action came for hearing on cross-motions for summary judgment before the Honorable BARRINGTON D. PARKER, United States District Court Judge, in Courtroom No. 19, commencing approximately 11:00 o'clock, a.m.

PROCEEDINGS

THE DEPUTY MARSHAL: Remain seated and come to order.

This Honorable Court is again in session.

THE DEPUTY CLERK: John Doe v. William Casey, Civil Action 82-2016.

Mr. Lynch and Miss Shaffer represent the plaintiff. Mr. White, Mr. Burke and Mr. Jaksetic represent the defendant.

THE COURT: Cross-motions of summary judgment?

MR. WHITE: That is correct, Your Honor.

MR. LYNCH: Yes, Your Honor.

THE COURT: Who filed earlier?

MR. LYNCH: We filed the first motion for summary judgment. The Government has a motion to dismiss as well, but we filed the first, yes.

THE COURT: Counsel, come to the lectern.

MR. WHITE: Yes, Your Honor.

The COURT: What is the theory of the motion to dismiss?

MR. WHITE: Your Honor, my name is David White.

THE COURT: I am sorry?

MR. WHITE: Department of Justice. We have basically four theories, Your Honor.

* * * *

[4] We further argue that plaintiff has failed to state a claim upon which relief may be granted inasmuch as this suit is barred by the Doctrine of Sovereign Immunity and that the issues are nonjusticiable.

* * * *

[37] AFTER RECESS (12:02 p.m.)

THE DEPUTY MARSHAL: Remain seated and come to order.

THE COURT: You may proceed, counsel.

MR. WHITE: Thank you, Your Honor.

THE COURT: I may indicate that one troublesome question, I don't know whether it is troublesome or not, but one paramount question emerges from all I have heard this morning and also from the papers filed in this proceeding is whether or not you claim that the agency has unlimited and unbridled authority.

Mr. Lynch used the rather extravagant example that if you follow your argument to its conclusion, you could make a determination that all one-armed men with a cleft palate would be dismissed.

THE COURT: I want to know to what extent you claim the authority to do the sort of thing that he claims is done here without any statement of reasons.

MR. WHITE: The director is not asserting that he has what the Court has characterized as unlimited or unbridled authority.

The statutes applicable to the Director's authority certainly do not give him the power to act unconstitutionally and the provisions of Title VII, for example, would apply [38] if there is a fair allegation of improper personnel practices discriminating against employees on the basis of race, for example.

The position of the Director is based upon the statute, is that his authority is very broad because the statute says that notwithstanding the provisions of any other law, the Director of Central Intelligence may in his discretion terminate an employee when he deems it advisable or necessary in the interests of the United States. And the cases that have reviewed this matter specifically, Baker and Pittman and the other cases that the Court referred to and that Mr. Lynch referred to have all held that the Director's authority is very broad. In one case it was described as plenary.

[50] THE COURT: Would you like to comment on this statement: "Defendant suggests that the interest of the [51] United States requires maximum secrecy about the CIA and that such secrecy could best be preserved by foreclosure of judicial review of agency personnel decisions, but neither the language nor the apparent intent of Section 403(3) suggests that Congress intended to protect the secrecy of the CIA at all costs or intended that the Director be the sole judge of the interests of the United States in all CIA personnel cases, even where the Constitution is implicated."

MR. WHITE: Your Honor, we make no assertion and the Director makes no assertion that the statute under which he acted in this case insulates him from the Constitution.

THE COURT: Well, you say that the plaintiff's constitutional argument is misplaced.

It doesn't rise to the level of a constitutional issue, is that it?

MR. WHITE: That is correct, Your Honor.

THE COURT: Did you know what I was reading from?

MR. WHITE: It sounded like the Jordan case, Your Honor, but I was not certain.

THE COURT: What do you think of Judge Oberdorfer's opinion?

You put it on the record, that is all right.

I won't share the transcript with him.

MR. WHITE: I think.

THE COURT: He will understand.

[52] MR. WHITE: I think basically there are two distinctions to be made. First is that in that case, as I understand it, the Agency was not arguing that there was no review if there was a substantial constitutional claim made; they were arguing that the plaintiff's act, which in that case was the publication of a telegram that he had sent back to headquarters, they were arguing that that act was not protected First Amendment activity.

And the second distinction to be made is obviously that in this case we don't have a First Amendment claim and as I stated, we don't have in this case subject matter which arises to a substantial constitutional claim.

Now I can see that there are possible problems attendant to that because the Court might ask, well, how do we know whether there is a substantial constitutional claim or not without looking into how the Director made his decision and, although that is a difficult question to answer, there are some circumstances which are analogous to that.

For example, in suits against federal officers the Courts, the Supreme Court recently held that in suits for personal damages against federal officers where there is a claim of constitutional violation, the Courts have held that

basically there has to be a pretty substantial claim made before the defendant would be required to answer, and in the case of Harlow against Fitzgerald, decided last term by the [53] Supreme Court made reference to the fact that unless the law was clearly established at the time the defendant acted, then there will be no discovery and the claim will be dismissed.

Basically, that is a little bit of a paraphrase, but the point is, Your Honor, really the presumptions of regularity and proper action must go in favor of the Agency because of the Agency's special concerns and because of the interests reflected in the statute and, therefore, the plaintiff at a minimum must come forward with substantial First Amendment claim or constitutional claim before the Court could begin to look at reviewing the circumstances.

Now in the absence of a concrete situation, I am not sure I could really address the issue any further. I would not know, for example, what position we would take if there had been a substantial First Amendment claim, and I suspect we would have several defenses—or I'm sorry I said First Amendment—but I meant constitutional in general.

THE COURT: The fact of the matter is we do not believe that there is substantial constitutional claim. He is labeled as a security risk; is that what he is labeled as?

MR. WHITE: Well, Your Honor, I would dispute that only in terms of how the label is applied. That is, I think we might have had a slightly different situation if a public disclosure were made so labeling him.

The circumstances here are that such a disclosure [54] would be made under special circumstances which have not arisen, and so no constitutional interest has at this point been affected, and in this case it would be the constitutional interest in liberty, as described by the plaintiff's papers.

Supreme Court, U.S.
FILED
MAY 3 1996
CLERK

(2)

No. 95-1482

In the Supreme Court of the United States

OCTOBER TERM, 1995

FERNANDO E. MATA, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a special agent of the Federal Bureau of Investigation (FBI) may obtain judicial review, under Title VII of the Civil Rights Act of 1964, of the revocation of his security clearance by the FBI.

2. Whether a special agent of the FBI may bring a *Bivens* action based on the allegedly retaliatory revocation of his security clearance.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

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FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 71 F.3d 513. The order of the district court (Pet. App. 5a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1995. The petition for a writ of certiorari was filed on March 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In *Perez* v. *FBI*, 707 F. Supp. 891 (W.D. Tex. 1988), a class action filed on behalf of Hispanic FBI agents, the district court found that the FBI had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), by failing "to give Hispanic agents proper credit for their contributions, and consequently exclud[ing] the agents from promotions and benefits." R. 1031.[1] In addressing the named plaintiff's and class members' claims that the FBI had also unlawfully retaliated against them for pursuing their Title VII remedies (see 42 U.S.C. 2000e-3(a)), the court ruled that an employee claiming retaliation in violation of Title VII must demonstrate that, "but for" his or her participation in the Title VII legal proceedings, the adverse action would not have occurred. See 707 F. Supp. at 921-922. The court subsequently found that the FBI had retaliated against the named plaintiff, Perez, but ruled that there was no evidence of retaliation against other class members. *Id.* at 926; 714 F. Supp. 1414, 1433 (W.D. Tex. 1989), aff'd, 956 F.2d 265 (5th Cir. 1992) (mem.).

To provide a remedy for past discrimination, the district court appointed a panel of special masters to review the entitlement of those members of the class who had attained a rank of GS-13 or higher by May 5, 1989 (with one year experience), to "[r]ightful place seniority." 714 F. Supp. at 1417, 1435. The court limited the panel's powers to recommending individuals for promotion. *Id.* at 1421, 1436.

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[1] Citations to "R." refer to page numbers in the record on appeal in this case.

2. Petitioner is a member of the plaintiff class in *Perez*. On January 24, 1990, the FBI Security Programs Manager, Gary L. Stoops, formally notified petitioner that the FBI had received information that he had disclosed classified information to unauthorized individuals, and that the FBI was suspending his access to national security information, pending investigation and final security clearance adjudication. R. 151. Following further investigation, Stoops issued, on August 13, 1990, a notice of proposed revocation of petitioner's security clearance. R. 165-170. That action was based on petitioner's admitted unauthorized disclosure of classified information to individuals representing the Cuban Government and his fabrication and embellishment of official reports to FBI Headquarters. R. 167. Stoops concluded that petitioner's continued access to national security information was not clearly consistent with the interests of national security. R. 168.

Petitioner was advised of his right to respond, R. 170, and did so through counsel, R. 172-186. He did not deny having disclosed classified information to unauthorized individuals, but he attempted to explain some of his disclosures as necessary in order to recruit an informant. Responding to the charge that he used poor judgment in handling FBI confidential sources, petitioner explained that it was necessary to establish close personal ties in order to gain the trust of potential informants. R. 177-178. He also asserted that the security clearance action was being taken by the FBI to retaliate against him for his role in the *Perez* case. R. 185.

By letter of April 9, 1991, Stoops informed petitioner that he had reaffirmed his decision to revoke petitioner's security clearance. R. 188-197. Respond-

ing specifically to petitioner's charge of retaliation, Stoops explained that he had based his action solely on the investigative record developed in connection with the information concerning petitioner's breaches of national security and fabrication of an official report. R. 189. On the basis of that record, Stoops stated, he was "unable to conclude with any confidence that the reinstatement of [petitioner's] security clearance would be consistent with the interests of national security." *Ibid.* Petitioner was advised that he could appeal the clearance revocation to the Department of Justice Security Officer (R. 197), and he did so on May 2, 1991 (R. 199-245), raising essentially the same arguments.

By letter of August 6, 1991, the Department of Justice Security Officer, D. Jerry Rubino, upheld the revocation of petitioner's Top Secret security clearance, based on an independent review of petitioner's file. R. 247-250. He relied for his decision solely on petitioner's admissions of "making multiple disclosures of National Security Information (NSI) to foreign nationals," particularly Cuban nationals (R. 247), and on petitioner's admitted fabrication of an official report (R. 249). On September 6, 1991, petitioner was notified by the FBI Associate Deputy Director for Administration that, because all agent positions require Top Secret security clearances, he would be dismissed because he was unable to perform the functions of a Special Agent. R. 252-253. The Director of the FBI subsequently informed petitioner's attorneys that he concurred with the dismissal decision. R. 264.

3. Petitioner sought review of the revocation of his security clearance and his dismissal by filing a motion for relief in the *Perez* litigation. Following a

hearing on that motion, the district court concluded that it lacked jurisdiction to review petitioner's contention that the FBI had retaliated against him in violation of Title VII when it revoked his security clearance. Pet. App. 5a-12a.

The court first addressed *Department of Navy* v. *Egan*, 484 U.S. 518 (1988), which held that 5 U.S.C. 7513, governing appeals by federal employees from adverse personnel actions to the Merit Systems Protection Board (MSPB), does not give the MSPB authority to review Executive Branch agency decisions to revoke security clearances. It also considered *Webster* v. *Doe*, 486 U.S. 592 (1988), which held that the courts could review a constitutional equal-protection claim brought by a former employee of the Central Intelligence Agency (CIA), who asserted that he had been dismissed because he was homosexual. Pet. App. 6a-8a. The court noted that the Fifth Circuit had not addressed the applicability of the reasoning of *Egan* to the Title VII context, but it observed that three other courts of appeals had interpreted *Egan* "to give Executive decision making the broadest possible power to preclude judicial review." *Id.* at 7a.

The court then considered two Fourth Circuit decisions in which that court ruled that neither the Rehabilitation Act of 1973 nor Title VII provides for judicial review of security clearance determinations. Pet. App. 9a-11a (discussing *Jamil* v. *Department of Defense*, 910 F.2d 1203 (1990), and *Guillot* v. *Garrett*, 970 F.2d 1320 (1992)). In *Guillot*, the Fourth Circuit relied on *Egan* to hold that security clearance decisions may not be challenged under Title VII, because (it concluded) there is "no more an expression of congressional intent in * * * [Title VII] than in [5

U.S.C. 7513] that the Executive's security clearance decisions be reviewable by the MSPB or by federal courts on appeal." 970 F.2d at 1325.

Following *Guillot*, the district court concluded that it lacked jurisdiction to review, under Title VII, the revocation of petitioner's security clearance. Pet. App. 11a-12a. It also indicated that petitioner could not make a claim based directly on the Constitution because the alleged retaliation "does fall under Title VII and thus Title VII is the sole vehicle for relief." *Id.* at 9a (citing *Brown* v. *GSA*, 425 U.S. 820 (1976)).

4. The court of appeals affirmed. Pet. App. 1a-4a. It concluded that, "[b]ecause the court would have to examine the legitimacy and the possibly pretextual nature of the FBI's proffered reasons for revoking [petitioner's] security clearance, any Title VII challenge would of necessity require some judicial scrutiny of the merits of the revocation decision." *Id.* at 3a & n.5 (citing *Brazil* v. *Department of Navy*, 66 F.3d 193 (9th Cir. 1995), cert. denied, 116 S. Ct. 1317 (1996)). Accordingly, it concluded, "neither we nor the district court have jurisdiction to consider those matters." Pet. App. 4a.

Relying on *Egan*, the court stated that security clearances are "entrusted by law to the Executive." Pet. App. 3a n.6. It also remarked that " '[p]redictive judgments of this kind' properly are left to 'those with the necessary expertise in protecting [the sensitive material,]' rather than in the hands of 'an outside nonexpert body' or the equally nonexpert federal courts." *Ibid.* (quoting *Egan*, 484 U.S. at 529) (bracketed material added by court of appeals).

The court also ruled that petitioner could not bring a *Bivens* claim to challenge the revocation of his clearance. Pet. App. 4a. It held that such a claim is

precluded because Title VII provides the exclusive cause of action for federal employees who wish to assert claims of employment discrimination. *Id.* at 4a & n.8 (citing *Brown* v. *GSA*, *supra*).

ARGUMENT

1. Petitioner contends that, under Title VII of the Civil Rights Act of 1964, the courts may review the FBI's revocation of his security clearance to decide whether the FBI engaged in unlawful retaliation. The court of appeals' decision to the contrary is consistent with the decisions of the other two courts of appeals that have considered that issue, and it does not conflict with any decision of this Court. This Court recently denied review in another case presenting the same issue, *Brazil* v. *Department of Navy*, 116 S. Ct. 1317 (1996), and there is no reason for a different result in this case.

a. Both lower courts in this case, and the other courts of appeals that have considered the Title VII issue presented, relied upon this Court's decision in *Department of Navy* v. *Egan*, 484 U.S. 518 (1988). In *Egan*, the Court held that Congress had not authorized the Merit Systems Protection Board (MSPB) to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse federal personnel action. The text of the statute at issue in that case, 5 U.S.C. 7513, neither expressly provided for nor expressly precluded appellate administrative review over an agency's denial of a security clearance, and the respondent contended that the absence of express preclusion "create[d] a strong presumption in favor of appellate review." 484 U.S. at 526. The Court rejected that argument; it stated that, while, as a

general matter of administrative law, there may indeed be a presumption of appellate review of agency action, that proposition "runs aground when it encounters concerns of national security, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." *Id.* at 526-527.

The Court also observed that "[t]he grant of a clearance requires an affirmative act of discretion on the part of the granting official" (484 U.S. at 528), and that the decision-making involved is "an inexact science at best" (*id.* at 529). Because "[p]redictive judgments of this kind must be made by those with the necessary expertise[,] * * * it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk." *Ibid.* Accordingly, "unless Congress specifically has provided otherwise," courts should be reluctant to intrude on the authority of the Executive Branch to grant or deny security clearances. *Id.* at 530.

b. Relying on *Egan*, the courts of appeals have, thus far, unanimously concluded that Congress did not intend courts to review revocations of individual security clearances in the context of Title VII litigation. Petitioner contends (Pet. 11-12) that the decision below conflicts with the *McDonnell Douglas* framework for review of Title VII claims, because it gives him no opportunity to prove pretext. See

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792, 802 (1973). The court of appeals concluded, however, that it was precisely the issue of pretext that presents a problem under *Egan*, for, it reasoned, if the courts considered the possibly pretextual nature of the FBI's proffered reasons for revoking the clearance, they would necessarily have to consider the merits of those reasons. See Pet. App. 3a. A similar decision of the Ninth Circuit takes the same view. In *Brazil* v. *Department of Navy*, 66 F.3d 193 (9th Cir. 1995), cert. denied, 116 S. Ct. 1317 (1996), which involved an allegation of a discriminatory revocation of a security clearance, the Navy proffered evidence, at the second stage of the *McDonnell Douglas* framework, that the plaintiff's clearance was terminated for legitimate, non-discriminatory reasons. Addressing the plaintiff's argument that he should be permitted to present evidence of pretext, the Ninth Circuit stated as follows:

> The second and third steps of the Title VII analysis present an insurmountable hurdle for Brazil. It is impossible for the court to establish in the first place whether the Navy's proffered reasons were legitimate without evaluating their merits. Even if the court were able to get by step two, it is very likely to be impossible for it to proceed to step three and determine whether the given reasons were mere pretext without considering their merits.

Id. at 197. The court held that it could not review the revocation of Brazil's clearance under Title VII.

In considering a claim of discrimination based on disability under Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791, which parallels much of Title

VII, the Fourth Circuit also relied on *Egan* to conclude that it could not review the Navy's revocation of the plaintiff's security clearance. *Guillot* v. *Garrett*, 970 F.2d 1320 (1992). After considering at length the statements in *Egan* that appellate bodies do not have authority to review security clearance decisions unless "Congress *specifically* has provided otherwise," *id.* at 1324, the court stated, "[w]e can discern * * * no more an expression of congressional intent in the provisions of the Rehabilitation Act or the Civil Rights Act of 1964 than in section 7513 of title 5 that the Executive's security clearance decisions be reviewable by the MSPB or by federal courts on appeal." *Id.* at 1325.

The courts of appeals that have considered the question have therefore been unanimous in concluding that, since Congress has not expressly provided for such review, the merits of individual security clearance decisions should not be reviewed by courts under Title VII.[2] They have also reached similar conclusions about judicial review of security clearance denials under other statutes and in other contexts.[3]

---

[2] Petitioner's contention (Pet. 13), that the decision below conflicts with *South Dakota* v. *Bourland*, 508 U.S. 679 (1993), is incorrect. That case did not arise in the national security context, and therefore did not involve the concern, expressed in *Egan*, 484 U.S. at 529, about "outside, nonexpert" review of security clearance decisions.

[3] In *Dorfmont* v. *Brown*, 913 F.2d 1399 (1990), cert. denied, 499 U.S. 905 (1991), the Ninth Circuit affirmed the dismissal of a suit by an employee of a defense contractor, who challenged the revocation of her security clearance on due process grounds. The court held that the "reasoning [in *Egan*]

applies no less to the federal courts than to the MSPB. When it comes to security matters, a federal court is 'an outside nonexpert body'" without authority to review security clearance denials. 913 F.2d at 1401; accord *Hill* v. *Department of Air Force*, 844 F.2d 1407, 1409 (10th Cir.), cert. denied, 488 U.S. 825 (1988).

In *Dubbs* v. *CIA*, 866 F.2d 1114 (1989), the Ninth Circuit held that a plaintiff could pursue a constitutional challenge to the denial of her security clearance, allegedly on the basis of her sexual orientation, as a violation of equal protection principles. That court also held, however, that the plaintiff could not challenge the denial of the security clearance under the Administrative Procedure Act.

The D.C. Circuit held in *United States Information Agency* v. *Krc*, 905 F.2d 389 (1990), that the Foreign Service Act does not give the Foreign Service Grievance Board jurisdiction to review the decision of a security program manager to withdraw a foreign service officer plaintiff from overseas postings, and that the court also did not have authority under the Administrative Procedure Act to review the decision.

Petitioner relies on a Policy Statement issued by the Equal Employment Opportunity Commission (EEOC) to argue that national security agencies are covered by Title VII. *EEOC: Policy Statements on National Security Defense to Bias Charges*, 8 Lab. Rel. Rep. (BNA) 405:6625 (May 1, 1989); Pet. 12-13. That Policy Statement, however, explicitly provides that the EEOC will not review the merits of security clearance decisions, and relies on *Egan* for that conclusion (8 Lab. Rel. Rep. (BNA) at 405:6626) (emphasis added)):

> The Supreme Court recently stated that nonexpert bodies cannot second guess the discretionary decisions of agency heads in determining who is qualified to receive security clearance [footnote citing *Egan*]. *The Commission is therefore precluded from reviewing the substance of security clearance decisions.* The Commission is also precluded from reviewing the validity of the security requirement itself. However, * * * the Commission is not precluded from determining whether the grant, denial or revocation

2. Petitioner also urges (Pet. 18-21) this Court to decide whether courts may entertain a challenge to the revocation of a security clearance based directly on the equal protection component of the Fifth Amendment, under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Petitioner failed, however, to plead a *Bivens* action, either in the underlying *Perez* complaint (R. 2, ¶ 2; R. 26-27, ¶¶ 1-3), or in his motion for relief filed with the *Perez* court (see R. 70-88). The second amended class complaint in the *Perez* litigation ostensibly raises claims under *Bivens* (R. 57), but that complaint does not purport to sue the officials named in the caption (the Attorney General and the Director of the FBI) in their individual capacities, nor does it name any other individual defendants. The district court's decisions in the class action rested entirely on Title VII. See *Perez* v. *FBI*, 707 F. Supp.

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of security clearances is conducted in a nondiscriminatory manner.

Relying on that policy statement, the Commission has concluded on several occasions that it may not consider whether an individual's security clearance was denied or revoked for a discriminatory reason, and has reiterated that matters "within the rubric of a security clearance determination * * * [are] beyond the Commission's jurisdiction." *Schroeder* v. *Perry*, 1994 WL 735565 at * 3 (E.E.O.C. Apr. 14, 1994) (declining to consider whether placement of derogatory statements in security clearance file intended to discriminate on the basis of disability); *Fields* v. *Aspin*, 1993 WL 763357 at * 3 (E.E.O.C. Dec. 23, 1993) (declining to consider whether security clearance decision was discriminatory, because made on the basis of sex); *Phillips* v. *Dalton*, 1995 WL 95860 at * 3 (E.E.O.C. Mar. 3, 1995) (same, in case alleging race, national origin, age, and disability discrimination).

891 (W.D. Tex. 1988); 714 F. Supp. 1414, 1433 (W.D. Tex. 1989).

Similarly, petitioner's claims in his motion for relief were articulated solely under Title VII; he did not add any individuals to the caption of his motion, nor did he identify any unconstitutional conduct or attribute specific conduct to specific individuals. There is no suggestion that either of the individual defendants named in the complaint, Attorney General Edwin Meese and FBI Director William Webster, was personally involved in the revocation of petitioner's security clearance. A *Bivens* action may not be brought against a federal agency, see *FDIC* v. *Meyer*, 114 S. Ct. 996, 1004-1006 (1994), and the same rule logically applies to actions brought against federal officials in their official capacity, see *Brandon* v. *Holt*, 469 U.S. 464, 471-472 (1985). Thus, petitioner did not properly plead a *Bivens* action.

In all events, the court of appeals' decision (Pet. App. 10a-12a) that a *Bivens* action is not available to challenge the revocation of a security clearance is consistent with the decision of the Ninth Circuit in *Brazil* v. *Department of Navy*, *supra*, the only other appellate decision that has addressed the matter. In the decision below, the court of appeals concluded (Pet. App. 4a) that petitioner's *Bivens* action was precluded by *Brown* v. *GSA*, 425 U.S. 820, 835 (1976), which held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." The court concluded that the district court had "correctly relied on Supreme Court and Fifth Circuit precedent to the effect that Title VII provides the exclusive cause of action and the exclusive remedy for federal employees who wish to assert claims for employment discrimination," Pet.

App. 4a, and it cited *Brown* v. *GSA* for that proposition, *id.* at 4a n.8. In *Brazil*, the Ninth Circuit held, for the same reason and also in reliance on *Brown*, that a *Bivens* action is not available for discrimination claims in security clearance cases. 66 F.3d at 197-198.

Contrary to petitioner's suggestion (Pet. 19), the decision below does not conflict with *Davis* v. *Passman*, 442 U.S. 228 (1979). That case involved a congressional employee who (unlike petitioner) was at the time excluded entirely from the protection of Title VII and had no statutory remedy at all (in damages or otherwise) for employment discrimination. Although the court of appeals in this case did not address *Davis* v. *Passman*, the Ninth Circuit observed in *Brazil* that, in situations like this one, unlike that in *Davis* v. *Passman*, "Congress has designed a program that provides what it considers adequate remedial mechanisms for constitutional violations, [and] *Bivens* actions should not be implied." See *Brazil*, 66 F.3d at 198.

Petitioner also seeks support from *Webster* v. *Doe*, 486 U.S. 592, 603-604 (1988), in which the Court held that Congress had not foreclosed the courts from reviewing a "colorable constitutional claim" that the respondent in that case had been discharged from the Central Intelligence Agency on the basis of sexual orientation. *Webster*, however, was a suit for reinstatement, not a *Bivens* action for damages; the complaint in that case did not request damages from any individual federal official. *Id.* at 596-597. It is therefore of little relevance to a determination

whether a *Bivens* action can be brought.[4] Moreover, although (as petitioner notes, Pet. 18), the Court stated in *Webster* that claims "attacking the hiring and promotion policies of the [CIA]" were already being heard by the federal courts, those claims do not necessarily involve the issue of the grant or denial of a security clearance.

3. We also note that the President has recently established an administrative remedy for claims of discrimination in security clearance decisions. On August 2, 1995, the President issued Executive Order No. 12,968, which states that "[t]he United States Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information." Exec. Order No. 12,968, § 3.1(c), 60 Fed. Reg. 40,250 (1995). The Order provides for administrative review of revocations or denials of security clearances; it also provides that an employee who has received an adverse security clearance decision must be given a statement of reasons for the decision, and has the right to respond, the right to representation by counsel, and the right to appeal to a high-level panel within the agency. § 5.2, 60 Fed. Reg. 40,252. Although the actions here preceded the issuance of Executive Order No. 12,968, petitioner had the benefit of similar administrative procedures. He was provided with a statement of reasons for the suspension of his security clearance. He availed himself of the opportunity to respond to those reasons, and a final

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[4] The courts below addressed only whether petitioner could bring a *Bivens* action for damages. The case does not raise, and we do not address, the question whether any equitable cause of action under the Constitution might be available.

decision regarding revocation was made by an official other than the FBI security programs official.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 95-1482

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

FERNANDO E. MATA,
Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION, *ET AL.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION

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REPLY BRIEF IN SUPPORT OF THE PETITION

I.

The government concedes that the Fifth Circuit's construction of Title VII eliminates the third stage of the *McDonnell Douglas* framework for proving Title VII claims. Br. Opp. 8-9. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-04 (1973). The government argues that this result is compelled by a *non-Title VII* case, *Department of Navy* v. *Egan*, 484 U.S. 518 (1988), and the "unanimous" conclusion of two courts of appeals, including the Fifth Circuit here. Br. Opp. 9-10.

The two decisions create an irreconcilable -- and unnecessary -- conflict between *Egan* and *McDonnell Douglas*. First, under *McDonnell Douglas*, a Title VII "plaintiff *must* be given the opportunity to introduce evidence

that the proffered justification [for the employment action] is merely a pretext." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 578 (1978) (emphasis added); *see also United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 n.5 (1983). The government does nothing to reconcile this fundamental conflict.[1]

Second, the conflict is unnecessary given the plain, unambiguous language of Title VII. Title VII states: "All personnel actions affecting employees . . . in executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). From this all-inclusive coverage of Title VII, Congress carved out an affirmative defense based on "national security." 42 U.S.C. § 2000e-2(g). Using *Egan*, the government attempts to add yet another exception based on national security -- an *implicit* ouster of all *jurisdiction*. However, this Court does not permit the judiciary to create exceptions to the plain language of statutes where Congress has not done so. *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 26 (1993).

Notwithstanding Title VII's unambiguous language and statutory structure, the government argues that Congress has not expressly provided for review of security clearance decisions. Br. Opp. 10. However, the government offers no explanation as to how Congress could have made its intent any clearer. *See South Dakota* v. *Bourland*, 113 S. Ct. 2309, 2315-16 (1993) ("when Congress used the term 'all claims, rights, and demands' of the Tribe . . . it meant *all* claims,

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[1] Another case cited by the government, *Guillot* v. *Garrett*, 970 F.2d 1320 (4th Cir. 1992), is not even a Title VII case. The plaintiff there alleged that the Navy violated section 501 of the Rehabilitation Act of 1973 "by terminating him because of his alleged handicap of alcoholism and cocaine addiction." *Id.* at 1323.

rights, and demands") (emphasis in original) (citation omitted). Interpreting Title VII in accordance with its plain language avoids any conflict between *Egan* and *McDonnell Douglas*.[2]

II.

The Fifth Circuit's interpretation of Title VII also presents the "serious constitutional question" whether a federal statute may be "construed to deny any judicial forum for a colorable constitutional claim." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988). Petitioner cannot bring a *Bivens* action, argues the government, because Title VII is a kind of statutory mirage: it exists to provide Petitioner his "exclusive judicial remedy"; but it vanishes when Petitioner actually tries to employ it, depriving all courts of all jurisdiction to remedy violations of the Constitution. Br. Opp. 13-14.

The sweep of the Fifth Circuit's holding is without precedent in this Court. We are unaware of any case from this Court, and the government cites none, holding that

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[2] The government also does not dispute that *Chevron* requires deference to the EEOC's construction of Title VII. *See Chevron, U.S.A.* v. *Natural Resources Defense Council*, Inc., 467 U.S. 837 (1984). Even after *Egan*, courts are "not precluded from determining whether the grant, denial or revocation of security clearances is conducted in a nondiscriminatory manner." *EEOC: Policy Statement on National Security Defense to Bias Charges*, 8 Lab. Rel. Rep. (BNA) 405:6625, 405:6626 (May 1, 1989). "Employers cannot, *merely by invoking national security*, exempt themselves from coverage of the nondiscrimination provisions of [Title VII]." *Id.* The EEOC cases cited by the government, Br. Opp. 12 n.3, are consistent with this policy statement.

Congress can deny *any* judicial forum for a violation of fundamental constitutional rights.[3]

This Court always has required that some meaningful relief be afforded those whose fundamental constitutional rights have been violated. Thus, Title VII does not pre-empt a *Bivens* action when the plaintiff is "unprotected by the statute." *Davis* v. *Passman*, 442 U.S. 228, 247 (1979). This Court accorded a non-Title VII judicial remedy for a claim of federal employment discrimination to an alien who was not protected by Title VII, *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 96 (1976), and provided a judicial remedy for a homosexual who was not covered by Title VII, notwithstanding the CIA's argument that judicial review would "entail extensive 'rummaging around' in the Agency's affairs to the detriment of national security." *Webster*, 486 U.S. at 604.

The government fails to distinguish Petitioner's case from *Davis* or *Webster*. First, the government claims that, "unlike Petitioner," the plaintiff in *Davis* was "excluded entirely from the protection of Title VII and had no statutory remedy at all." Br. Opp. 14. The government nowhere explains how Petitioner is "protected" by Title VII when that

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[3] Congress surely has the power to narrow the remedies afforded a plaintiff for violations of constitutional rights. *See, e.g., Chappell* v. *Wallace*, 462 U.S. 296, 302-03, 305 n.2 (1983) (refusing to allow *Bivens* actions by military personnel against military superiors but noting the availability of statutory provisions for redress); *Bush* v. *Lucas*, 462 U.S. 367, 368, 387 (1983) (refusing *Bivens* action where statute provides "meaningful remedies against the United States," including a "trial-type hearing"); *Schweiker* v. *Chilicky*, 487 U.S. 423 (1988). But Congress cannot eliminate them altogether.

statute provides him no remedy; and the government does not identify any other statutory remedy available to Petitioner.[4]

Second, the government distinguishes *Webster* on the sole basis that the equitable relief sought in that case, "reinstatement," is different from the damages and equitable relief sought in this one. Br. Opp. 14-15. That trivial distinction actually undermines the government's argument, because the remedies sought by Petitioner are far less intrusive on the government than the reinstatement remedy sought by the *Webster* plaintiff. More importantly, the relevant question is whether the Constitution allows Congress to eliminate *all* judicial remedies for the government's violation of a person's rights under the First and Fifth Amendments. *Webster* and *Davis* hold that it does not, even when the interests at stake (sexual orientation and gender) fall on the periphery of constitutional rights. The violations here -- retaliation and racial discrimination -- go to the core of our constitutional rights, and require some meaningful judicial remedy.[5]

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[4] Petitioner had no opportunity to examine documents, call witnesses, cross-examine witnesses, or participate in an evidentiary hearing. His fate was left in the hands of those who were found to have discriminated against him. Accordingly, the government cannot legitimately claim that Petitioner "had the benefit of" any meaningful remedy. Br. Opp. 15.

[5] The government also seeks to avoid this issue by arguing that, although a *Bivens* action was expressly alleged in the Second Amended Complaint, R. 57, Petitioner failed properly to plead one. Br. Opp. 12. The government made the same argument in both the District Court and the Court of Appeals, and both courts rejected the argument and addressed the *Bivens* issue. Pet. App. 4a, 8a-9a. This Court should do the same.

III.

Finally, the government tries to redefine Petitioner's claim as "a review of a security clearance" so that the FBI can hide behind the protection of *Egan*. However, Petitioner's claim is about *retaliation*, not the revocation of a security clearance.[6]

For fifteen years Petitioner had a spotless record at the FBI. Nothing happened to him until he joined the *Perez* class action. After that he was berated in front of his fellow agents, threatened in connection with his testimony, made the subject of an investigation, and fired. Pet. at 4-7.

The FBI's investigation found that Petitioner had not violated any laws, or any internal rules, regulations, policies or procedures of the FBI or DOJ. *See* Pet. 5-6. Thus, in its own internal memorandum, the FBI concluded that "all *logical* investigation has been completed in an attempt to verify these allegations [against Petitioner], *without result*." R. 273 (emphasis added); *see* Pet. 5.

Nevertheless, instead of dropping the matter, the FBI continued its retaliation. Contrary to the government's assertions, the court need not scrutinize the merits of the revocation decision to conclude that the FBI's decision to go forward was merely a pretext. The court could find that the FBI continued its investigation of Petitioner -- after all *logical* investigation had been completed, and after the FBI had admitted that Petitioner had done nothing wrong -- only because Petitioner dared to join the Hispanic agents in their successful Title VII suit against the FBI.

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[6] The government distorts the record in an attempt to portray Petitioner as someone who, after a distinguished career, suddenly and inexplicably went on a binge of unauthorized disclosures. Contrary to the government's assertions, *see* Br. Op. 3-4, Petitioner did not "admit" the FBI's allegations of wrongdoing; in fact, he has consistently denied them. *See* R. 174-77, 203.

Citing *Brazil* v. *Department of Navy*, 66 F.3d 193 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1317 (1996), the government argues that there is no reason for the Court to review this case. Br. Opp. 7. Far from it. The undisputed retaliation against Petitioner distinguishes this case from *Brazil*. In *Brazil*, no actionable events had occurred before the revocation to show that it was a pretext. The court would have had to evaluate the merits of the revocation decision because that decision was the only action challenged by the plaintiff. *Id.* at 197. In other words, had the Navy chosen *not* to revoke the plaintiff's security clearance, he would have had no claim.

Here, by contrast, Petitioner obtained a judgment against the FBI for racial discrimination. The FBI retaliated against him for having done so, and the revocation came merely as a finishing touch to a course of retaliatory conduct. Had the FBI decided not to revoke Petitioner's security clearance, the court would have had jurisdiction over Petitioner's claims based on the earlier retaliation. The subsequent revocation of Petitioner's security clearance does not -- like a magic wand -- make the court's jurisdiction disappear. The government offers no reason why Petitioner should have no remedy for the actionable retaliation that occurred before, and independent of, the revocation decision.

Moreover, based on the FBI's own documents, the court can determine that the FBI never could have gotten to the point of even considering Petitioner's security clearance, unless it had a retaliatory motive. Thus, irrespective of the proffered reasons for the revocation decision, Petitioner can show pretext based on the FBI's treatment of him before he joined *Perez*, the FBI's reaction to his participation in *Perez*, the timing of the FBI's actions, the FBI's conduct against other persons who, after investigation, have been found to have done nothing wrong, and the FBI's general policy and

practice with respect to minorities. *See McDonnell Douglas*, 411 U.S. at 804-05 (1973).

CONCLUSION

For the reasons stated, certiorari should be granted.

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